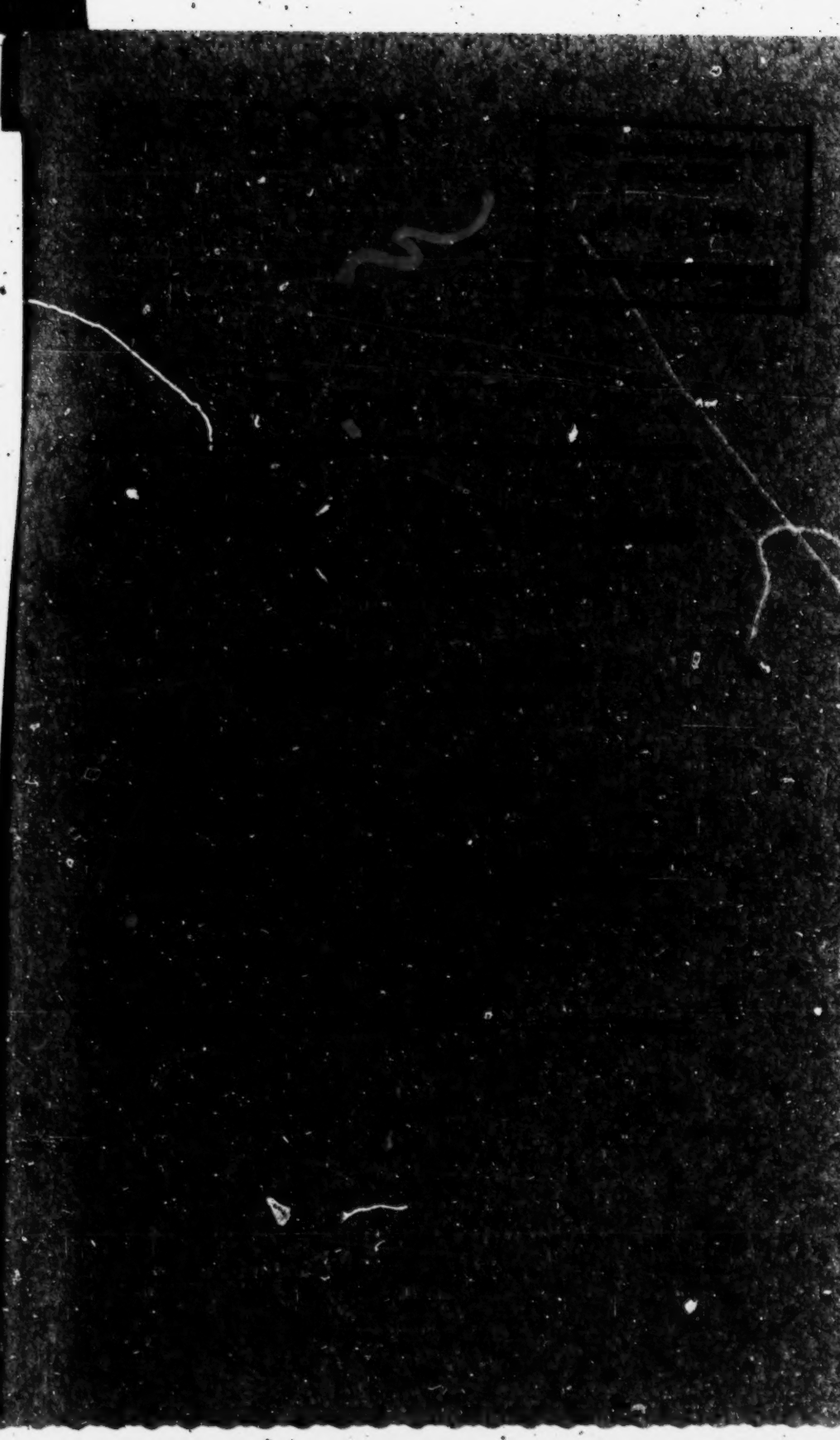

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	3
Statutes involved	3
Statement	4
Summary of argument	17
Argument	22
I. A conspiracy to commit a crime and the crime committed pursuant to the conspiracy are distinct offenses and, hence, separately punishable. Neither offense merges into the other	26
II. A conspirator is responsible for criminal acts committed pursuant to the conspiracy or as a natural consequence of the conspiracy, so long as he was a party to the conspiracy when the criminal acts were committed	37
Conclusion	52

CITATIONS

Cases:

Ader v. *United States*, 284 Fed. 13, certiorari denied, 260 N. S. 746	44
American Fur Co. v. *United States*, 2 Pet. 358	43
Baker v. *United States*, 115 F. 2d 533, certiorari denied, 312 U. S. 692	43
Banghart v. *United States*, 148 F. 2d 521, certiorari denied, 325 U. S. 887	31, 34
Blue v. *United States*, 138 F. 2d 351, certiorari denied, 322 U. S. 736	43
Boyd v. *United States*, 142 U. S. 450	21, 41
Brady v. *United States*, 24 F. 2d 399	34
Braverman v. *United States*, 317 U. S. 49	9, 10, 18, 25, 26, 30
Brooks v. *United States*, 267 U. S. 432	11
Brown v. *United States*, 150 U. S. 93	43
Burton v. *United States*, 142 Fed. 57	44
Butler v. *People*, 125 Ill. 641	42
Cardinal v. *United States*, 50 F. 2d 166	40
Carter v. *McClaughry*, 183 U. S. 365	19, 28, 32
Chambers v. *United States*, 237 Fed. 513	44
Claasen v. *United States*, 142 U. S. 140	11
Clune v. *United States*, 159 U. S. 590	27
Cochran v. *United States*, 41 F. 2d 193	43

691159—46——1

Cases—Continued.

	Page
Conn. Mut. Life Ins. Co. v. *Hillmon*, 188 U. S. 208	43
Cooper v. *State*, 60 Tex. Cr. Rep. 405	42, 43
Crawford v. *United States*, 212 U. S. 183	31
Direct Sales Co. v. *United States*, 319 U. S. 703	46
Evans v. *United States* (No. 2), 153 U. S. 608	11.
Ford v. *United States*, 273 U. S. 593	30
Freeman v. *United States*, 146 F. 2d 978	31
Frohwerk v. *United States*, 249 U. S. 204	30, 31
Gebardi v. *United States*, 287 U. S. 112	31, 34
Glasser v. *United States*, 315 U. S. 60	31
Gorin v. *United States*, 312 U. S. 19	11
Hanna v. *People*, 86 Ill. 243	42
Hart v. *United States*, 112 F. 2d 128	43
Heike v. *United States*, 227 U. S. 131	28
Hirabayashi v. *United States*, 320 U. S. 81	11
Hitchman Coal and Coke Co. v. *Mitchell*, 245 U. S. 229	46
Hyde v. *United States*, 225 U. S. 347	25, 40
Johnson v. *United States*, 62 F. 2d 32	44
Joplin Mercantile Co. v. *United States*, 236 U. S. 531	31
Kann v. *United States*, 140 F. 2d 380, reversed on other grounds, 323 U. S. 88	43
Krench v. *United States*, 42 F. 2d 51	31
Laughter v. *United States*, 259 Fed. 94, certiorari denied, 249 U. S. 613	35
Mackett v. *United States*, 90 F. 2d 462	43
Melling v. *United States*, 25 F. 2d 92	40
Morgan v. *Aderhold*, 73 F. 2d 171	32
Morgan v. *Devine*, 237 U. S. 632	32
Norris v. *United States*, 34 F. 2d 839, reversed on other grounds, 281 U. S. 619	34
Nudd v. *Burrows*, 91 U. S. 426	43
O'Brien v. *United States*, 25 F. 2d 90	41
Odom v. *State*, 172 Miss. 687	42
Parmagini v. *United States*, 42 F. 2d 721	32
People v. *Bringhurst*, 192 Cal. 748	42
People v. *Foley*, 59 Mich. 553	42
People v. *Lawrence*, 143 Cal. 148	42
People v. *Michalow*, 229 N. Y. 325	42, 43
People v. *Payne*, 359 Ill. 246	43
People v. *Pierce*, 387 Ill. 608	43
People v. *Raber*, 168 Cal. 316	42
People v. *Tavormina*, 257 N. Y. 84	33
People v. *Vasquez*, 49 Cal. 560	42
Pettibone v. *United States*, 148 U. S. 197	31
Pierce v. *United States*, 252 U. S. 239	11, 31
Pinkerton v. *United States*, 145 F. 2d 252	7

Cases—Continued. Page

Freeman v. *United States*, 244 Fed. 1, certiorari denied, 245 U. S. 654 — 44
Romero v. *State*, 101 Nebr. 650 — 42
St. Clair v. *United States*, 154 U. S. 134 — 39, 43
Sneed v. *United States*, 298 Fed. 911, certiorari denied, 265 U. S. 590 — 32, 33
Spies v. *People*, 122 Ill. 1 — 42, 43
State v. *Furney*, 41 Kan. 115 — 42
State v. *Heyward*, 2 Nott & McCord (S. C.) 312 — 42, 43
Thornton v. *United States*, 271 U. S. 414 — 31
Tincher v. *United States*, 11 F. 2d 18, certiorari denied, 271 U. S. 664 — 44
United States v. *Britton*, 108 U. S. 199 — 31
United States v. *Dietrich*, 126 Fed. 664 — 34
United States v. *Falcone*, 311 U. S. 205 — 46
United States v. *Fox*, 95 U. S. 670 — 45
United States v. *Gooding*, 12 Wheat. 460 — 43
United States v. *Hirsch*, 100 U. S. 33 — 26
United States v. *Holte*, 236 U. S. 140 — 31
United States v. *Katz*, 271 U. S. 354 — 34
United States v. *McElvain*, 272 U. S. 633 — 29
United States v. *N. Y. C. & H. R. R. Co.*, 146 Fed. 298 — 34
United States v. *Rabinowich*, 238 U. S. 78 — 10, 27, 29, 30
United States v. *Reed*, 117 F. 2d 808 — 2
United States v. *Sager*, 49 F. 2d 725 — 34
United States v. *Sall*, 116 F. 2d 745 — 22, 46, 48
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 — 49
United States v. *Stevenson (No. 2)*, 215 U. S. 201 — 28
United States v. *Wexler*, 79 F. 2d 526, certiorari denied, 297 U. S. 703 — 31, 32, 34
United States v. *Zeuli*, 137 F. 2d 845 — 34
Weiss v. *United States*, 103 F. 2d 759 — 35
Wiborg v. *United States*, 163 U. S. 632 — 43
Williamson v. *United States*, 207 U. S. 425 — 31
Wong Tai v. *United States*, 273 U. S. 77 — 31

Statutes:

Criminal Code:
Section 37 (18 U. S. C. 88) — 4
18 U. S. C. 338 — 43
Section 332 (18 U. S. C. 550) — 40

Internal Revenue Code (26 U. S. C. 2803, 3321):
Section 2803 — 3, 5
Section 2810 — 5
Section 2831 — 5
Section 2833 — 5
Section 2834 — 6

Statutes—Continued.

	Page
Internal Revenue Code—Continued.	
Section 3253	6
Section 3321	4, 5, 6, 9
26 U. S. C. 3748 (a)	9
Miscellaneous:	
37 A. L. R. 7	33
75 A. L. R. 1405	33
Annual Report of the Attorney General for the Fiscal Year 1925	35
1 Bishop, Criminal Law, 9th ed., p. 466	45
Criminal Appeals Rules (18 U. S. C. following 688):	
Rule 1	2
Rule 3	2
Rule 4	2
Rule 13	2
Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, p. 611	24
Shyre, *Criminal Responsibility for the Acts of Another*, 43 Harv. L. Rev. 689, 695, 708	41, 45

In the Supreme Court of the United States

OCTOBER TERM 1945

No. 719

W. DANIEL PINKERTON AND WALTER G. PINKERTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 242–245) is reported at 151 F. 2d 499.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 30, 1945 (R. 246), and a petition for rehearing was denied December 1, 1945 (R. 248). The petition for a writ of certiorari was filed January 4, 1946, and was granted March 4, 1946 (R. 248). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.[1]

[1] In the circuit court of appeals the Government moved to dismiss the appeal on the ground that the notice of appeal was filed too late. The circuit court of appeals stated (R. 243) that "Due to the peculiar facts relating to the filing of the notice of the taking of the appeal, and since the case is being affirmed on the merits, the court makes no decision on the motion to dismiss the appeal; it being the view of the court that in such action the appellee obtains the same result as it seeks by the motion to dismiss the appeal, and there is no injury to the appellants." We think the court could properly have denied the motion to dismiss the appeal. The notice of appeal was filed on May 9, 1945 (R. 215). In motions in the district court to correct the record following the motion to dismiss the appeal, petitioners' attorneys claimed that although petitioners were orally sentenced on the night of May 2, 1945, and although the written judgments of conviction and commitments bore the date of May 2 (R. 32–38), they were not written up or actually filed in the district court clerk's office until May 3 (R. 38–39, 42–43). The district judge did not question these assertions in denying the motions but rested upon the sentencing of the petitioners and the issuance of temporary commitments on May 2 (R. 39–42, 44–45). Rule 1 of the Criminal Appeals Rules then in effect (18 U. S. C. following 688) provided that "The judgment setting forth the sentence shall be signed by the judge who imposes the sentence and shall be entered by the clerk"; Rule 3 provided that an appeal shall be taken within five days "after entry of judgment of conviction"; under Rule 13 Sundays are excluded. If the judgments were not entered until May 3 the appeal was timely, being within the five-day period, excluding the intervening Sunday. The record does not contain a statement of the docket entries in the case in the form provided by Rule 4 of the Criminal Appeals Rules. Under these circumstances we have communicated with the United States Attorney, who advises that the judgments of conviction were not actually entered by the clerk until May 3. The appeal was therefore timely. Cf. *United States* v. *Reed*, 117 F. 2d 808, 809 (C. C. A. 5).

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether on petitioners' convictions upon an indictment charging in one count a conspiracy to violate various provisions of the Internal Revenue Code and in other counts substantive offenses in violation of one of those provisions, they could validly be sentenced on the substantive counts to a term of imprisonment exceeding the two year maximum penalty provided for by the conspiracy statute, which had been imposed upon them on the conspiracy count.

2. Whether a conspirator may be convicted of a substantive offense in which he did not directly participate where the crime was committed by another conspirator pursuant to the conspiracy or where its commission was a natural consequence of the conspiracy.

STATUTES INVOLVED

Section 2803 of the Internal Revenue Code (26 U. S. C. 2803) provides in pertinent part:

> (a) No person shall transport, possess * * * any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. * * *
>
> * * * * *
>
> (g) Any person who violates any provi-

> sion of this section * * * shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both. * * *

Section 3321 of the Internal Revenue Code (26 U. S. C. 3321) provides in pertinent part:

> (a) Every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine of not more than $5,000 or be imprisoned for not more than 3 years, or both.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than 2 years, or both.

STATEMENT

An eleven-count indictment was returned against petitioners in the District Court for the Northern District of Alabama on April 17, 1945, the first ten counts charging petitioners with violations of the Internal Revenue Code, and the

last count charging petitioners with conspiracy to violate certain provisions of the Code (R. 2–13). Counts 1 and 10 (R. 2, 7–8) charged petitioners with unlawful possession of whiskey in unstamped containers on October 7, 1939, and May 29, 1940, respectively (26 U. S. C. 2803, *supra*, pp. 3–4). Counts 2 to 9, inclusive (R. 3–7), charged that on various dates between October 7, 1939, and June 26, 1943, petitioners had unlawfully removed, deposited, and concealed specified quantities of whiskey with intent to defraud the United States of the tax imposed thereon (26 U. S. C. 3321, *supra*, p. 4). Count 11 (R. 8–13) charged petitioners and others (not made defendants) with conspiring from August 12, 1938, to the fall of 1943 to violate various sections of the Internal Revenue Code, viz., carrying on the business of a distiller of spirituous liquor without having given the required bond (26 U. S. C. 2833); having in their possession unregistered stills (26 U. S. C. 2810); engaging in the business of a distiller of spirituous liquor with intent to defraud the United States of the tax imposed thereon (26 U. S. C. 2833); working in and carrying raw materials to an unregistered distillery (26 U. S. C. 2831); transporting, possessing, buying, and selling whiskey in unstamped containers (26 U. S. C. 2803); removing, depositing, and concealing whiskey with intent to defraud the United States of the tax imposed

thereon (26 U. S. C. 3321, *supra*, p. 4); carrying on the business of a retail liquor dealer without payment of the required tax (26 U. S. C. 3253); carrying on the business of a wholesale liquor dealer without payment of the required tax (26 U. S. C. 3253); and making mash at other than an authorized distillery (26 U. S. C. 2834). The count set forth numerous overt acts alleged to have been committed pursuant to the conspiracy and to effect its objects (R. 10–13).[2] Petitioners interposed a demurrer to the indictment on various grounds, including that on the face of the indictment the offenses charged were barred by the statute of limitations (R. 13–15). They also filed a plea of former jeopardy as to the conspiracy count (R. 18) to which the United States

---

[2] The concurrence of dates and persons involved indicates that several of the overt acts relate to offenses charged in the substantive counts. Cf. overt act 2 (R. 10) with count 1 (R. 2); overt act 4 (R. 11) with count 10 (R. 7); overt act 6 (R. 11) with count 4 (R. 4); overt act 9 (R. 12) with count 5 (R. 4–5); overt act 13 (R. 12) with count 7 (R. 5–6); overt act 14 (R. 12) with count 8 (R. 6); overt act 15 (R. 12) with count 9 (R. 7).

demurred (R. 19–25).[3] The trial court overruled petitioners' demurrer to the indictment and sustained the Government's demurrer to the plea of former jeopardy (R. 25–26). Petitioner W. Daniel Pinkerton, additionally, pleaded that he had previously been convicted of the offenses charged in counts 1, 2, and 4 (R. 16–17). The Government did not oppose this plea and it was sustained (R. 26).

After a jury trial W. Daniel Pinkerton was found guilty on substantive counts 3, 5, 6, 8, 9 and 10 and on count 11, the conspiracy count; Walter G. Pinkerton was found guilty on substantive counts 1 to 6, inclusive, and counts 8 to 10, inclusive, and on the conspiracy count, count 11

[3] On petitioners' appeal, their conviction on an earlier single-count indictment charging a conspiracy to violate most of the sections of the Internal Revenue Code involved in the instant proceeding was reversed and the cause remanded because of errors in the charge. See *Pinkerton* v. *United States*, 145 F. 2d 252 (C. C. A. 5). It appears that after this reversal petitioners were reindicted in the present case (see Government's demurrer to the former jeopardy plea, R. 19–25). The new indictment, in so far as it charged a conspiracy, did not cover the same period as the earlier indictment; it charged 16 as compared with 19 overt acts; and it added as an object the removal, depositing, and concealment of whiskey with intent to defraud the United States of the tax, an offense proscribed by 26 U. S. C. 3321 (cf. R. 8 to 13 with 145 F. 2d at 253).

(R. 32).[4] Walter was sentenced generally on the substantive counts to imprisonment for a term of 30 months and to pay a fine of $500, and on the conspiracy count he was sentenced to imprisonment for a term of two years, the sentence to run concurrently with the sentence imposed on the substantive counts (R. 32–35). Daniel was sentenced generally on the substantive counts to imprisonment for a term of 30 months and to pay a fine of $1,000, and on the conspiracy count he was sentenced to imprisonment for a term of two years and to pay a fine of $500, the sentence to imprisonment to run concurrently with the imprisonment sentence imposed on the substantive counts (R. 35–38). Petitioners appealed to the Circuit Court of Appeals for the Fifth Circuit assigning 68 errors (R. 218–235), but only certain ones were called specially to the attention of the court (R. 243). The court considered these and held them, with one exception, to be without merit. It ruled that counts 1 and 10, the substantive counts charging possession of liquor in unstamped containers, were barred by a three-year statute of limitations and hence that petitioners' demurrer

[4] As has been previously stated, *supra*, p. 7, Daniel's plea of former jeopardy as to counts 1, 2, and 4 was sustained. Count 7, on which both petitioners were acquitted, charged that on December 17, 1942, they unlawfully removed, deposited, and concealed 19 gallons of whiskey with intent to defraud the United States of the tax imposed thereon (R. 5–6).

as to them should have been sustained (R. 243).[5] Since, however, each of the remaining substantive counts upon which the jury had returned a verdict of guilty involved 26 U. S. C. 3321, the removal and concealment statute, which permits a maximum punishment of three years' imprisonment and a fine of $5,000 (*supra*, p. 4), the validity of the smaller general sentence of a fine and imprisonment imposed upon each petitioner under

---

[5] The applicable statute of limitations (26 U. S. C. 3748 (a)) is discussed in *Braverman* v. *United States*, 317 U. S. 49, 54–55. It would seem from that discussion that the circuit court of appeals ruled correctly that counts 1 and 10, the possession counts, were barred by the three-year limitation; it was not an element of the offense which those counts charged that there be any wilful attempt to evade or defeat the payment of federal taxes. The other substantive counts related to offenses which involved defrauding or attempting to defraud the United States, and hence there can be no doubt that they are covered by the six-year limitation period.

In so far as the conspiracy count is concerned, the circuit court of appeals was of the view that some of the overt acts, presumably some of them relating to the possession of liquor in unstamped containers, were governed by a three-year limitation, but thought that that was immaterial since other overt acts alleged and proved were subject to a six-year limitation (R. 245). The conspiracy count in the instant case does not differ in essence so far as the objective offenses are concerned from the conspiracy indictment in the *Braverman* case (cf. pp. 5–6, *supra*, with footnote 1, p. 50 of the *Braverman* decision). In that case the Court held that the various objects of the conspiracy required the application of a six and not a three-year period of limitation since the larger period applies not only to a conspiracy having as its object the commission of an offense in which defrauding or attempting to defraud the United States is an element but also to a conspiracy which

the substantive counts was not affected by the court's ruling as to counts 1 and 10 (cf. R. 245),[6] and the judgments of conviction were consequently affirmed.

---

involves an attempt to evade or defeat the payment of federal taxes. Consequently, the circuit court of appeals was, we submit, wrong in assuming that a three-year period was applicable in any respect to the conspiracy count; the conspiracy charge was correctly framed on the assumption that a six-year period of limitation applied (see R. 8), and the district court correctly charged that that was the applicable period (R. 180–181). Cf. *United States* v. *Rabinowich*, 238 U. S. 78.

In any event, as the conspiracy count was finally submitted to the jury (see p. 17, *infra*), there can be no doubt that a six-year period governed, since the only objects of the conspiracy which were not withdrawn from the jury's consideration were objects which manifestly related either to the defrauding of the Government, or attempts to defeat or evade the payment of federal taxes.

The earlier conspiracy indictment had been framed on the assumption that a three-year limitation period governed and the convictions were reversed because the trial judge did not adequately charge on that basis (see 145 F. 2d at 253, 254). The Department file indicates that the United States Attorney first became aware of the *Braverman* decision upon the remand of the case, and consequently secured the present indictment, which was formulated upon a six instead of a three-year limitation basis. He apparently added the substantive counts because, under his understanding that a six-year limitation period was applicable, he felt that there were enough substantive offenses as to which petitioners could be successfully prosecuted to justify him in including them in the indictment.

[6] In their petition for a writ of certiorari (p. 2) petitioners raise the question whether the court's ruling on counts 1 and 10 invalidates petitioners' general sentences on the substantive

The evidence to support the counts of the indictment here involved may be summarized as follows:

Count 11 (the conspiracy count)[7]—Petitioners

counts. The question is not argued either in the petition or in petitioners' brief on the merits. However, in *Claasen* v. *United States*, 142 U. S. 140, a similar situation was involved. A verdict of guilty was returned as to each of five counts of an indictment and a general sentence was imposed. This Court considered it necessary to determine that only one of the five counts was sufficient, since the sentence was within the punishment permitted for a single offense. The Court said that "there is no reason why that sentence should not be applied to any one of the counts which was good" (p. 147), and that "it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only. *Locke* v. *United States*, 7 Cranch, 339, 344; *Clifton* v. *United States*, 4 How. 242, 250; *Snyder* v. *United States*, 112 U. S. 216; *Bond* v. *Dustin*, 112 U. S. 604, 609; 1 Bishop Crim. Pro. § 1015; Wharton Crim. Pl. & Pract. § 771." See also *Evans* v. *United States* (*No. 2*), 153 U. S. 608, 609, another general sentence case. Analogously, the same result has been reached in concurrent sentence cases. See *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105; *Gorin* v. *United States*, 312 U. S. 19, 22, 33; *Brooks* v. *United States*, 267 U. S. 432, 441. In several of the concurrent sentence cases the two types of decisions are cited indiscriminately. See *Brooks* v. *United States*, *supra*; *Pierce* v. *United States*, 252 U. S. 239, 242, 252–253.

[7] In summarizing the evidence under this count, we refer only to the general evidence which does not relate to a particular substantive count. The evidence set out below supporting the substantive counts supports the conspiracy count as well.

are brothers. They live on a farm of 96 acres located in Fayette County, Alabama. The farm is owned by Daniel. They have separate homes on the same side of the road. The homes are about 150 to 200 yards apart. Two well travelled paths ran between the two houses, one at the sides near the road and the other at the rear of the houses (R. 97, 54–56, 73, 91–93, 148, 159, 164).[8] Petitioners appeared to be in frequent contact with each other (R. 66, 74, 123–124, 159). Beginning in 1935 Daniel had a retail liquor dealer's license issued by the Federal Government (R. 157–158), although his home county was a dry county (R. 74, 149, 157). Investigators had found moonshine whiskey around Daniel's house at various times between January 1935 and August 1938 (R. 50–72).[9] On one of these occasions Daniel was apprehended carrying a jug of moonshine whiskey (R. 62–63). He had also been observed carrying to automobiles bottles which he had presumably secured from a thicket near his house. Moonshine whiskey had been discovered in this thicket (R. 68–69).

Between 1935 and 1942 the investigators found empty containers at various points on the property. Some of these containers smelled of moon-

[8] Diagrams of the farm appear at pages 55 and 92 of the record.

[9] These offenses were barred by the six-year statute of limitations (*supra*, p. 9, footnote 5). This evidence was admitted solely to show intent and the existence of a conspiracy at that time (R. 72, 180–181).

shine whiskey (R. 64–65, 74, 75, 76, 82, 91, 93, 94, 120). Between 1938 and 1942 petitioners had often been arrested for violations of the state and federal liquor laws, and they would make bond for each other (R. 125–131, 165). On one occasion in August 1940, when the investigators were searching Daniel's house, at which time Daniel was present, Walter appeared with a rifle and threatened to kill one of them (R. 75, 78–79, 112, 117–118). On another occasion, April 15, 1941, an undercover agent drove up to Daniel's house and asked to purchase whiskey. Walter was there, and he sold the agent a pint of tax-paid whiskey and a half-pint of peach alcohol, on which no taxes had been paid. Walter went into Daniel's house for the peach alcohol, and he told the agent that the peach mixture was his own and that he had a "good sale on it" (R. 107–109).

Counts 2 and 4 [10]—On October 7, 1939, investigators observed Daniel go to a "stump hole" near his house, reach into the hole and take out two bottles, which the investigators found to contain two pints of moonshine whiskey. They then went to the hole where they found six pints of moonshine whiskey in tax-paid bottles (R. 73–74, 111, 117). On December 7, 1940, they found three pints of moonshine whiskey concealed in the wall

[10] All of the substantive counts here involved charged removal, deposit, and concealment of whiskey. As has been stated above (*supra*, p. 7), counts 2 and 4 were dismissed as to Daniel on his plea of former jeopardy.

of Daniel's garage. Daniel said he did not know how the whiskey got there (R. 75, 112, 118).

Count 3—On May 29, 1940, five investigators searched the vicinity of Walter's house. About 150 yards east of the house they found a "jacket can" buried in the ground. The can contained two and a half gallons of moonshine whiskey. A well-beaten trail led from Walter's house to the place where the can was buried. South of the house at the edge of the yard they found a gallon and two pints of moonshine whiskey in a jug and in bottles. Around the house and the yard they found other containers which at one time had had whiskey in them (R. 74, 79–80, 82–83, 90–91, 111–112, 117).

Count 5—On October 11, 1941, the investigators went to Walter's house. Walter was present. They found two gallon jugs in a bedroom. The jugs were filled with moonshine whiskey. (R. 89–90, 114, 116, 118–119, 121.)

Count 6—In the autumn of 1942 the investigators found a gallon of moonshine whiskey in a glass jug concealed in a swamp across the road from Walter's house. It had been raining and the investigators saw identical footprints which led from the front door of Walter's house to the swamp and back to the house (R. 91, 95, 97).

Count 8—On February 5, 1943, Walter and Cornelius Porter (a co-conspirator) drove to the next county, where Walter purchased nineteen

gallons of moonshine whiskey. On the way back they were pursued by officers. They abandoned the car and the whiskey, which were seized by the officers (R. 100–101, 119–120). The car, a 1936 Ford, had in the fall of 1942 been in Daniel's yard for about six weeks undergoing repairs (R. 95–96, 99, 119).

Count 9—On June 26, 1943, four men drove into Walter's yard. Two of the men walked to the back of the house with Walter. They returned to the car, drove off, and one of the men who had been at the house produced a pint of moonshine whiskey. No whiskey had been seen in the possession of the occupants of the car before it entered Walter's yard. Officers saw the car leave, pursued it, and seized the whiskey (R. 84–87, 96, 97–98).

Each petitioner, testifying in his own defense, denied any implication in the offenses charged (R. 148–154, 155–169).[11] While petitioners did not move for a directed verdict of acquittal either at the close of the Government's case or at the close of all the evidence (see R. 132, 173), they requested the judge to charge the jury in respect of each count that if they believed the evidence they must find petitioners not guilty. The judge refused so to charge except in respect of Daniel as to counts 1, 2, and 4 (R. 197, 207–210), as to

[11] In respect of counts 1 2, and 4 Daniel relied on his plea of former jeopardy (R. 155).

which counts Daniel had pleaded former jeopardy (*supra*, p. 7).

The trial judge, having instructed the jury at length in respect of the conspiracy count (R. 173–182), and having commented on the evidence (R. 183–189), told the jury in respect of the substantive counts 2 to 9, inclusive, that in order to find petitioners guilty it was necessary for the Government to prove beyond a reasonable doubt that the whiskey involved in those counts had been removed, deposited, or concealed "by the defendants, or by one of them" (R. 190). He then told the jury that if they were satisfied from the evidence that at the time the substantive offenses were committed petitioners were "in an unlawful conspiracy, as I have heretofore defined unlawful conspiracy to you, then you would have a right * * * to convict each of these defendants on all these substantive counts, provided the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy or object of the unlawful conspiracy, which you have found from the evidence existed" (R. 191–192). In the portion of his charge dealing with the conspiracy count the judge had stated to the jury the substance of that count, including the various objects of the conspiracy as set forth in the indictment (R. 174–176). After doing this, he at length defined a conspiracy in the traditional terms (R. 177–182).

The only exception petitioners took to the judge's colloquial charge related apparently to his instruction that each petitioner could be convicted of the substantive offenses if the jury found that they had been committed pursuant to the conspiracy, stating that Daniel had been confined to prison when some of those offenses had been committed (R. 194).

At petitioners' request the judge withdrew from the jury's consideration all objects of the conspiracy, except that petitioners conspired to remove, deposit, and conceal whiskey with intent to defraud the Government of the tax imposed thereon, that they conspired to transport, possess, buy, and sell whiskey in unstamped containers, and, apparently, in respect of sales by Walter, that they conspired that he should carry on the business of a retail liquor dealer without having paid the required tax[12] (see R. 198–199).

SUMMARY OF ARGUMENT

Petitioners' principal contention is that, under the circumstances of this case, they could not be sentenced to imprisonment for more than the two-year maximum provided by the conspiracy

[12] Since Daniel had a retailer liquor dealer's license, we assume that petitioners' requested instruction No. A19 (R. 199) was intended to absolve them from liability on the conspiracy count insofar as an object of the conspiracy may have been retail sales by Daniel without the payment of the required tax.

statute; therefore, they claim that the thirty months' sentence imposed as to each of them on the substantive counts is invalid. They argue that since their conviction on the substantive counts depends solely upon the fact that the jury found that these offenses were committed pursuant to a conspiracy, each of the substantive counts became a separate conspiracy count, but since there was only a single conspiracy charged and proved, under the rule enunciated in *Braverman* v. *United States*, 317 U. S. 49, only a single sentence not exceeding the maximum two-year penalty provided by the conspiracy statute could be imposed.

The crux of petitioners' argument is the notion that when a substantive offense is committed pursuant to a conspiracy to commit that offense, the substantive offense cannot be punished because it merges into the conspiracy. We show that this notion is completely without foundation. We then show that each petitioner's guilt of a substantive offense in the commission of which he had no direct participation may be established by showing that he was a party to a conspiracy in furtherance of which the offense was committed. We conclude that the thirty months' sentences on the substantive counts are valid.

Preliminarily, it is clear that the *Braverman* case is of no aid to petitioners. The Court there held that where several counts of an indictment

each charge a conspiracy to violate a different statute and the evidence shows only a single conspiracy, a conviction on the several counts will not sustain a sentence exceeding the maximum penalty for a single violation of the conspiracy statute, since, there being only one agreement, there is only one offense. That situation is obviously not parallel with the situation here presented.

I

This Court has recognized on numerous occasions and in varying situations that a conspiracy to commit a crime is an offense entirely distinct and separate from the crime which is the object of the conspiracy. These decisions, if they do not directly hold that the two offenses may be tried and punished as independent offenses, make that answer inevitable. A decision closely in point, if not dispositive in principle, is *Carter* v. *McClaughry*, 183 U. S. 365.

Until petitioners made the point, no one, so far as we have discovered, has ever urged that the objective offense when committed merges into the conspiracy. The former doctrine that a conspiracy merged into the substantive offense when that was committed is now generally rejected for the reason that the bases upon which it rested no longer exist. Any application of a merger doctrine would thwart the manifest congressional

purpose of permitting punishment not only of the objective offense, but also of the conspiracy.

While attention has been called to the abuse which may result from the practice of including conspiracy and substantive counts in certain cases, the criticism is without relevance in this case. The criticism is directed against the tacking on of a conspiracy count for what is purely joint substantive criminal activity. This was not the situation here.

II

Daniel's guilt on the substantive counts here involved rests upon the trial judge's instruction to the jury that if they found that at the time the substantive offenses were committed petitioners were in an unlawful conspiracy and that the substantive offenses charged were committed in furtherance of the conspiracy or its objects, each petitioner could be found guilty of the substantive offenses. The circuit court of appeals appears to have approved this theory of guilt. We believe that the theory is correct and that on that basis the instruction furnished the jury with a proper standard for ascertaining Daniel's guilt of the substantive offenses.

Numerous decisions have held that a party to a conspiracy to commit a crime may be held criminally responsible for the commission by another of the objective offense or of an offense which is the

natural consequence of the conspiracy if he was a party to the conspiracy at the time of the commission of the offense. Responsibility in cases of this kind rests not upon any principle peculiar to the law of criminal conspiracy, but upon the rule, which no one doubts, that a person who counsels, procures, or commands another to commit a crime is himself also guilty of the crime because natural reason and elementary principles of causation so demand. The theory has been approved by this Court. *Boyd* v. *United States*, 142 U. S. 450, 455–456. It has been applied by the lower federal courts in numerous mail fraud cases in which a conspirator has been held substantively responsible for a mailing done by another pursuant to a conspiracy to violate the mail fraud statute.

We recognize, of course, that the doctrine cannot be extended to fasten liability for the commission of the substantive offense upon one who joins the conspiracy after the commission of the offense, since it is clear that an individual's ratification of another's criminal act cannot form the basis of criminal liability. No different principle is involved even in conspiracy prosecutions by the application of the doctrine that one who joins a conspiracy after its inception is bound by the acts and declarations of his co-conspirators notwithstanding they occur prior to his association with the conspiracy. The guilt of the later participant does not flow from the fact that the

earlier participants may have committed criminal acts, since the gist of the offense is the agreement to commit a crime and not the crime itself; the later participant becomes criminally responsible for the conspiracy because, with the requisite knowledge and intent, he associates himself with an existing combination to commit crime; the prior acts and declarations are utilized to establish the illegal character of the combination.

United States v. *Sall*, 116 F. 2d 745 (C. C. A. 3), the only decision we have found which fails to hold a conspirator for substantive offenses committed pursuant to the conspiracy, is unsound. It overlooks the rationale of causation upon which the rule rests.

On the basis of the nature of the conspiracy which was submitted for the jury's consideration, there can be no doubt that the substantive offenses were, at the least, natural consequences of the conspiracy.

ARGUMENT

Petitioners' principal contention (Br. 7, 9, 23) is that, under the circumstances of this case, they could not be sentenced to imprisonment for more than the two-year maximum term provided by the conspiracy statute (*supra*, p. 4); therefore, they claim that the thirty months' sentence imposed as to each of them on the substantive counts[13] is unsupportable. Their contention

[13] Each petitioner was also sentenced to a fine on the substantive counts (*supra*, p. 8).

arises in this way: The trial court permitted each petitioner to be convicted under substantive counts as to which the evidence did not show he was a direct participant: Walter as to counts 2 and 4, and Daniel as to counts 3, 5, 6, 8 and 9.[14] It did this by virtue of its instruction (*supra*, p. 16) that each petitioner could be found guilty of a substantive offense which he, himself, did not commit directly, if that offense was committed pursuant to a conspiracy to which he was a party or to effect the objects of such a conspiracy.[15]

Hence, petitioners' conviction upon the substantive counts[16] must depend solely upon the fact that

---

[14] As to Walter, substantive counts 1, 7 and 10, and as to Daniel, substantive counts 1, 2, 4, 7 and 10, have been eliminated from the case for reasons which have been indicated.

[15] The question is of no importance as to Walter since the evidence showed, *supra*, pp. 14–15, that he was the direct actor in respect of counts 3, 5, 6, 8 and 9, and his general sentence of thirty months' imprisonment and a fine of $500 on the substantive counts is supportable under either one of the counts enumerated (see footnote 6 *supra*, pp. 10–11). Petitioners seem to recognize this, because their brief on the merits is devoted principally to Daniel's conviction (Br. 13, 15, 21, 22).

The question is, however, vital to Daniel, since the only substantive counts which may be considered as to which he was the direct actor are counts 2 and 4, and as to these he had been convicted in a prior proceeding. His general sentence of thirty months' imprisonment and a fine of $1,000 must rest, therefore, upon substantive counts 3, 5, 6, 8 and 9, offenses in which he did not directly participate.

[16] But see footnote 15, as to Walter.

the jury found that these offenses were committed pursuant to a conspiracy. "With this in mind," they say (Br. 15), "we are now faced with the fact that each of the substantive counts become separate counts, each charging a conspiracy to violate a separate and distinct Internal Revenue Law of the United States." But, they continue, there was but "a single agreement to commit acts in violation of several penal statutes," which, under the rule enunciated by this Court in *Braverman* v. *United States*, 317 U. S. 49, will sustain only a single sentence not exceeding the maximum penalty of two years' imprisonment provided for by the conspiracy statute (*supra*, p. 4). From this the conclusion is reached that the thirty months' sentence imposed on each petitioner on the substantive counts is excessive (Br. 13–23).[17]

---

[17] In petitioners' brief on the merits (Br. 22), but not in the petition for a writ of certiorari, it is also contended that there is not sufficient evidence to sustain Daniel's conviction on the conspiracy count and that if he was ever a party to a conspiracy his dealings in illegal whiskey ceased after the commission of the substantive offenses for which he was previously convicted and before the commission of the substantive offenses in which Walter was the direct actor, i. e., that he withdrew from the conspiracy prior to Walter's misdeeds. This contention was evidently not made in the circuit court of appeals for it is not discussed in that court's opinion, and the opinion discusses such of the numerous assignments of error as were pressed upon the court (R. 243). It would therefore seem that the contention need not be considered here. See Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, p. 611. In any event, we think that the evidence of continuing cooperation

It is evident that the crux of petitioners' argument is the notion that when a substantive offense is committed pursuant to a conspiracy to commit that offense, the substantive offense cannot be separately punished because it merges into the conspiracy. This notion is completely without foundation, as we will first show. We will then endeavor to show that each petitioner's guilt of a substantive offense in the commission of which he had no direct participation may be established by showing that he was a party to a conspiracy in furtherance of which the offense was committed. We conclude that the thirty months' sentences on the substantive counts are valid.

Preliminarily, it is clear that the *Braverman* case is of no aid to petitioners. There this Court held that where several counts of an indictment each charge a conspiracy to violate a different statute and the evidence shows only a single conspiracy, a conviction on the several counts will not sustain a sentence exceeding two years' imprisonment, the

---

between Daniel and Walter which is revealed by the evidence outlined in the Statement makes it abundantly clear that the jury was entitled to conclude that the two were in a conspiracy which endured during the period covered by the conspiracy count. As we have indicated (*supra*, pp. 9–10), no question of the statute of limitations is involved. There is no basis in the present record for any claim that Daniel withdrew from the conspiracy prior to the offenses which Walter directly committed. Withdrawal from a conspiracy must be evidenced by affirmative action (*Hyde* v. *United States*, 225 U. S. 347, 369). There is no such evidence.

maximum penalty for a single violation of the conspiracy statute (*supra*, p. 4). This ruling is founded upon the proposition that the conspiracy statute is aimed at punishing the agreement which constitutes the conspiracy, so that if there is but one agreement, albeit the agreement contemplates the commission of several offenses, there is only one offense. "The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one." 317 U. S. at 53. But in *Braverman's* case the prosecution was solely for conspiracy. The indictment did not charge any substantive offenses committed pursuant to the conspiracy. In the instant case, petitioners were charged with, tried for, and convicted of (1) a single conspiracy to commit several offenses, and (2) the commission of some of the substantive offenses alleged as an object of the conspiracy. The situations are obviously not parallel.

I

A CONSPIRACY TO COMMIT A CRIME AND THE CRIME COMMITTED PURSUANT TO THE CONSPIRACY ARE DISTINCT OFFENSES AND, HENCE, SEPARATELY PUNISHABLE. NEITHER OFFENSE MERGES INTO THE OTHER.

From *United States* v. *Hirsch*, 100 U. S. 33, to *Braverman* v. *United States*, 317 U. S. 49, *supra*, this Court has recognized on numerous occasions and in varying situations that a conspiracy to commit a crime is an offense entirely distinct and separate from the crime which is

the object of the conspiracy. These decisions, if they do not directly hold that the two offenses may be tried and punished as independent offenses, make that answer inevitable.

In the *Hirsch* case, the Court held that a conspiracy to defraud the United States of duties was not an offense arising under the revenue laws so as to be governed by the period of limitations provided for in respect of offenses arising under those laws.[18]

In *Clune* v. *United States*, 159 U. S. 590, plaintiff in error, who had been convicted of conspiring to commit the offense of obstructing the passage of the United States mails, contended that a conspiracy to commit an offense cannot be punished more severely than the offense itself. In rejecting the contention, this Court said (p. 595):

> A conspiracy to commit an offense is denounced as itself a separate offense, and the punishment therefor fixed by the statute, and we know of no lack of power in Congress to thus deal with a conspiracy. Whatever may be thought of the wisdom or propriety of a statute making a conspiracy to do an act punishable more severely than the doing of the act itself, it is a matter to be considered solely by the legislative body. *Callan* v. *Wilson*, 127 U. S. 540, 555. The power exists to separate the conspiracy from the act itself

[18] See also *Rabinowich* case, p. 29 *infra*.

and to affix distinct and independent penalties to each."

A decision closely in point, if not dispositive in principle, is *Carter* v. *McClaughry*, 183 U. S. 365, 390–395. There the contention was that Carter had been placed twice in jeopardy upon conviction by a court martial of conspiracy to defraud the United States and also of causing false and fraudulent claims to be made against the United States upon the ground that the sentence imposed upon him was greater than the court martial could inflict on conviction of either of the offenses charged, taken singly. This Court rejected the contention because of the distinctiveness of the offenses and said that "The fact that both charges related to and grew out of one transaction made no difference." (183 U. S. at 394–395).

In *Heike* v. *United States*, 227 U. S. 131, petitioner was indicted for frauds on the revenue and in a separate count for conspiracy to commit such frauds. He was convicted on the conspiracy count. He urged in this Court that if the evidence proved him guilty of a conspiracy it proved him guilty of the substantive offense. But the Court said (p. 144):

> * * * the liability for conspiracy is not taken away by its success—that is, by the accomplishment of the substantive offence at which the conspiracy aims. *Brown* v.

[19] See also *United States* v. *Stevenson* (*No. 2*), 215 U. S. 201, 203.

Elliott, 225 U. S. 392. *Reg.* v. *Button*, 11 Q. B. 929. *Rex* v. *Sprägg*, 2 Burr. 993, 999.

In the leading case of *United States* v. *Rabinowich*, 238 U. S. 78, the Court held that a conspiracy to commit an offense denounced by the Bankruptcy Act was not an offense arising under that Act so as to be governed by the period of limitations specified by the Act for offenses arising under it.[20] In reviewing the earlier decisions, the Court said (pp. 85–86):

> It is apparent from a reading of § 37, Crim. Code (§ 5440, Rev. Stat.), and has been repeatedly declared in decisions of this court that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. *Callan* v. *Wilson*, 127 U. S. 540, 555; *Clune* v. *United States*, 159 U. S. 590, 595; *Williamson* v. *United States*, 207 U. S. 425, 447; *United States* v. *Stevenson (No. 2)*, 215 U. S. 200, 203. And see *Burton* v. *United States*, 202 U. S. 344, 377; *Morgan* v. *Devine*, 237 U. S. 632. The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is none the less punishable. *Williamson* v. *United States*, *supra*. And it is punishable as conspiracy, though the intended crime be accomplished. *Heike* v. *United States*, 227 U. S. 131, 144.

In respect of the argument that it was incon-

[20] See also *United States* v. *McElvain*, 272 U. S. 633, 638.

sistent with the policy of the Bankruptcy Act to allow a larger period for the prosecution of a conspiracy to violate one of its penal clauses than for the violation itself, the Court pointed out (238 U. S. at 88):

> For two or more to conferedate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.

In the *Braverman* case, which we have discussed at *supra*, pp. 25–26, it was said (317 U.S. at 54):

> A conspiracy is not the commission of the crime which it contemplates, and neither violates nor "arises under" the statute whose violation is its object.[21]

It is therefore quite manifest that under federal law the conspiracy and the objective offense are

[21] Upon the same postulate, that it is the unlawful agreement to offend against the penal laws of the United States at which the conspiracy statute is directed, this Court has decided that a single count for conspiracy to commit two offenses is not bad for duplicity (*Frohwerk* v. *United States*, 249 U. S. 204, 209–210; *Ford* v. *United States*, 273 U. S.

as distinct as robbery and arson. Hence, it follows that each inevitably carries its own penal sanction, which may be imposed without regard to the punishment administered for the other, leaving no room for merger of one with the other. See *Banghart* v. *United States*, 148 F. 2d 521 (C. C. A. 4), certiorari denied, 325 U. S. 887;[22]

593, 602); that the conspiracy must be sufficiently charged and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the objects of the conspiracy (*United States* v. *Britton*, 108 U. S. 199, 205; *Pettibone* v. *United States*, 148 U. S. 197, 203; *Pierce* v. *United States*, 252 U. S. 239, 244); that in an indictment for conspiracy the same degree of detail is not required in stating the object of the conspiracy as if the indictment were one charging the substantive offense (*Williamson* v. *United States*, 207 U. S. 425, 447–448; *Crawford* v. *United States*, 212 U. S. 183, 191–192; *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, 548–549; *Frohwerk* v. *United States*, 249 U. S. 204, 209; *Thornton* v. *United States*, 271 U. S. 414, 423; *Wong Tai* v. *United States*, 273 U. S. 77, 81; *Glasser* v. *United States*, 315 U. S. 60, 66); that a person may be guilty of conspiring although incapable of committing the objective offense (*Williamson* v. *United States*, 207 U. S. 425; *United States* v. *Holte*, 236 U. S. 140; see also *Gebardi* v. *United States*, 287 U. S. 112).

[22] In the *Banghart* case the overt act to support the conspiracy count was the same act charged as the basis for one of the substantive counts. See Memorandum in Opposition, p. 4, No. 1212, October Term, 1944. *Freeman* v. *United States*, 146 F. 2d 978 (C. C. A. 6), which held that only one punishment could be imposed for the substantive offense and a conspiracy to commit the offense is, as we pointed out in our Memorandum in Opposition in the *Banghart* case (p. 6), an isolated and clearly erroneous decision. The Sixth Circuit relied upon its analogous decision in *French* v. *United States*, 42 F. 2d 51, which is criticised in *United States* v. *Werler*, 79 F. 2d 526, 528 (C. C. A. 2), certiorari denied, 297 U. S. 703.

United States v. *Wexler*, 79 F. 2d 526, 527–528 (C. C. A. 2), certiorari denied, 297 U. S. 703; *Morgan* v. *Aderhold*, 73 F. 2d 171, 173 (C. C. A. 5); *Parmagini* v. *United States*, 42 F. 2d 721, 725 (C. C. A. 9); *Sneed* v. *United States*, 298 Fed. 911, 913 (C. C. A. 5), certiorari denied, 265 U. S. 590; see also *Morgan* v. *Devine*, 237 U. S. 632.[23]

Until petitioners made the point, no one, so far as we have discovered, has ever urged that the objective offense when committed merged into the conspiracy. It is true that at common law the doctrine of merger was recognized in conspiracy law where the completed offense was a felony. But then a conspiracy to commit a crime was only a misdemeanor. A conspiracy to commit a misdemeanor did not merge when the misdemeanor was committed. The "so-called" doctrine of merger rested on several reasons: there was a forfeiture of property to the King on conviction of a felony; persons indicted for a misdemeanor had certain advantages at the trial—such as the right to make a full defense by counsel, to have a copy of the indictment, and to have a special jury—privileges not accorded to a person indicted for a felony. The reasons for the rule

[23] It may be noted that in *Morgan* v. *Devine*, where the Court upheld consecutive sentences for the offense of breaking into a post office and the offense of stealing property belonging to the Post Office Department, it cited *Carter* v. *McClaughry*, 183 U. S. 365 (*supra*, p. 28) as authority for the holding. See 237 U. S. at 641.

do not, of course, currently exist, and the doctrine has now been generally rejected.[24]

And, whatever vestiges may yet remain, the merger doctrine clearly has no application in federal conspiracy law. The conspiracy statute makes the crime it denounces a felony, and this is so even though the conspiracy be one to commit a misdemeanor. Additionally, any application of a merger doctrine would thwart the manifest congressional purpose of permitting punishment not only of the objective offense but of the conspiracy. As the decisions point out, the aim of the conspiracy statute is to punish the evil of confederating and combining together, irrespective of whether the conspiracy succeeds in its criminal purpose. The combined plotting is often a more serious evil than the commission of the contemplated crime itself, with the result that it may be punished more severely than the objective offense. Frequently, too, it would be difficult to convict of the substantive offense men who conceive the crime and then delegate its commission to others.

In only two types of cases, so far as we are aware, has it been held that it would be against the congressional policy to permit prosecutions

[24] See the annotations to *Sneed* v. *United States*, *supra*, in 37 A. L. R. 778 and to *People* v. *Tavormina*, 257 N. Y. 84 (1931) in 75 A. L. R. 1405.

both for the agreement and the substantive offense: (1) in the *concursus necessarius* cases, where the commission of the substantive offense necessarily requires joint action[25] and (2) where the substantive statute excludes punishment for one who does no more than voluntarily participate in the crime of another.[26] In these cases the substantive offense only may be punished.

While there is no basis in law for an assault on the inclusion of conspiracy and substantive counts

---

[25] See *United States* v. *Katz*, 271 U. S. 354, 355; *United States* v. *Zeuli*, 137 F. 2d 845, 846 (C. C. A. 2); *United States* v. *Sager*, 49 F. 2d 725, 727 (C. C. A. 2); *Norris* v. *United States*, 34 F. 2d 839, 841 (C. C. A. 3), reversed on other grounds, 281 U. S. 619; *United States* v. *N. Y. C. & H. R. R. Co.*, 146 Fed. 298, 303 (C. C. S. D. N. Y.); *United States* v. *Dietrich*, 126 Fed. 664, 667 (C. C. D. Neb.). If there is any basis in law for the doubt expressed in some mail fraud cases as to whether a prosecution may lie both for the conspiracy and any substantive offense committed pursuant to it, where the schemers, the conspirators, the overt acts, and the substantive offenses are the same (see *Brady* v. *United States*, 24 F. 2d 399, 404–405) (C. C. A. 8) and decisions cited; but cf. *United States* v. *Wexler*, 79 F. 2d 526 (C. C. A. 2), certiorari denied, 279 U. S. 703, and *Banghart* v. *United States*, 148 F. 2d 521 (C. C. A. 4), certiorari denied, 325 U. S. 887), the process of rationalization is somewhat assimilable to that utilized in the *concursus necessarius* cases.

[26] See *Gebardi* v. *United States*, 287 U. S. 112, where it was held to be against the policy of Congress as expressed in the Mann Act to prosecute for conspiracy the woman and the man who transports her even though the woman was willing to be transported for the immoral purpose.

in an appropriate case, we are aware that the courts have from time to time criticised the addition of a conspiracy count in cases where the facts show merely the joint commission of a substantive offense without evidence of a preconcert of plan. See for instance, recommendations of the senior circuit judges at their annual conference in June 1925, embodied in the Annual Report of the Attorney General for the Fiscal Year 1925, pp. 5–6.[27] The criticism has invariably however, been aimed at adding the conspiracy count rather than, as here, the substantive counts. But in this case no serious attack was made in the circuit court of appeals against the inclusion of the conspiracy count, and the compliant here has significance only insofar as Daniel is concerned and then primarily in the lim-

[27] This is the complaint to which the remarks of Judge Dickinson, in *Weiss* v. *United States*, 103 F. 2d 759 (C. C. A. 8), quoted by petitioners, are addressed. When he states that "it is easy to distinguish them [the conspiracy and the objective offense] as two different offenses and yet the truth is that the conspiracy is merged in the substantive crime upon its commission," it is obvious that he is not speaking in any legalistic sense but in the sense that every crime committed jointly involves the element of conspiracy and should be punished merely as a substantive crime and not as a conspiracy in the absence of preconcerted plan. This would seem to be also the tenor of the remarks of Judge Denison in *Laughter* v. *United States*, 259 Fed. 94, 99 (C. C. A. 6), certiorari denied, 249 U. S. 613, cited by petitioners, if they may be regarded as criticism.

ited sense that it is made in the attempt to avoid liability on the substantive counts. However, even if there had been no charge of conspiracy in the indictment, Daniel could be held on the substantive counts on the principle of causation because of his conspiratorial activity, as we later point out (*infra*, pp. 37–51). So far as the substantive counts are concerned, they were added apparently because the United States Attorney became aware, when he learned of the *Braverman* decision, that there was available a six-year statute of limitations relating to various types of internal revenue crimes (see footnote 5, *supra*, p. 10). In any event, so far as Walter is concerned, the evidence adduced directly implicated him in most of the substantive crimes charged, and so far as Daniel was charged substantively with the crimes in which Walter was the principal participant, the United States Attorney proceeded on the well-recognized principle of causation adverted to. If there was any abuse here it would only be in that the United States Attorney was wrong in his application of that settled principle to Daniel's

case and thus should not have charged him substantively. Hence, it is evident that the criticism levelled against the tacking on of a conspiracy count for what is purely joint substantive criminal activity without preconcerted plan is without relevance in this case; the conspiracy endured for several years and a number of offenses were committed pursuant to it.

II

A conspirator is responsible for criminal acts committed pursuant to the conspiracy or as a natural consequence of the conspiracy, so long as he was a party to the conspiracy when the criminal acts were committed

We have stated, *supra*, p. 23, that in respect of Daniel's conviction on substantive counts 3, 5, 6, 8, and 9, there is no evidence to show that he participated directly in the commission of the offenses charged in those counts. The evidence adduced at the trial (*supra*, pp. 14–15) shows that the direct actor in those offenses was Walter. Since the validity of Daniel's sentence on the substantive counts rests entirely on his guilt of the offenses charged in the counts mentioned, the ques-

tion is whether his conviction on those counts is supportable.[28]

Daniel's guilt on the substantive counts was submitted to the jury on the theory that if they found that at the time the substantive offenses were committed petitioners were in an unlawful conspiracy and that the substantive offenses charged were committed in furtherance of the conspiracy or its objects, each petitioner could be found guilty of the substantive offenses.[29] The circuit court of appeals appears to have approved this theory of guilt, stating (R. 244):

> In deciding the guilt or innocence of the defendants on the several counts charging substantive offenses, the jury could weigh all the foregoing circumstances [the evidence tending to show a conspiracy] in

[28] The remaining substantive count as to which Daniel was convicted, count 10, cannot be utilized to support his sentence because, as the court below held (R. 243; *supra*, pp. 8–9), the offense there charged was barred by the statute of limitations.

While there is no evidence to show that Walter participated directly in the commission of the offenses charged in substantive counts 2 and 4 (see *supra*, pp. 13–14), as to which he was convicted, his sentence on the sul stantive counts is supported by his convictions of the offenses charged in counts 3, 5, 6, 8, and 9, in which he was the direct actor. Since his sentence on the substantive counts was a general one, it is supported by his conviction on those counts, even if his conviction on counts 2 and 4 may not be sustained (see *supra*, pp. 10–11, footnote 6).

[29] The trial judge had previously told the jury in respect of substantive counts 2 to 9, inclusive, that the Government was required to prove their commission "by the defendants, or by one of them" (R. 190).

determining whether these two appellants were in fact in a conspiracy in the acts that constitute the violations in the manner and form set out in the counts charging substantive offenses, and this would be true if there had been no conspiracy count in the indictment.

"Although conspiracy be not charged, if it be shown by the evidence to exist, the act of one or more defendants in furtherance of the common plan is in law the act of all." *Davis* v. *United States*, 12 Fed. (2d) 253.[30]

Daniel asserts (Br. 8, 9, 22–23) that this theory of his guilt of the substantive offenses is unsound.[31] We submit that the theory is sound—that a conspirator is responsible for criminal acts committed pursuant to the conspiracy or as a natural consequence of the conspiracy, so long as he was a party to the conspiracy at the time the criminal acts were committed. We further submit that on this basis the trial judge's instruction to the jury furnished them with a proper standard for ascertaining Daniel's guilt of the substantive offenses here involved.

The cases are legion where a party to a conspiracy to commit a crime has been held criminally responsible for the commission by another of the

[30] See *St. Clair* v. *United States*, 154 U. S. 134, 149.

[31] He states (Br. 8): "A person may not be convicted of an alleged substantive offense, when he was not the principal actor in the offense, nor participated therein, merely because it might be shown that he was a member of a conspiracy to commit these acts."

objective offense or of an offense which is the natural consequence of the conspiracy if he was a party to the conspiracy at the time of the commission of the offense. His responsibility rests not upon any principle peculiar to the law of criminal conspiracy as such, but upon the rule, which no one doubts, that a person who counsels, procures, or commands [32] another to commit a crime is himself also guilty of the crime [33] because

---

[32] Cf. *Hyde* v. *United States*, 225 U. S. 347, 368, involving a conspiracy between an employer and his employee.

[33] In this aspect the principle is embodied in the aider and abettor statute (sec. 332 of the Criminal Code, 18 U. S. C. 550), which provides:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

The trial judge charged, however, in terms of the principle. The case as to Daniel might have been submitted to the jury under the aider and abettor statute on the narrower basis, expressed in *Cardinal* v. *United States*, 50 F. 2d 166, 170 (C. C. A. 8), that "* * * one cannot knowingly permit his premises to be used for an unlawful purpose, thereby contributing to the success of the enterprise in a very substantial way, without becoming a party thereto, unless, within a reasonable time after becoming aware of the unlawful use, dependent upon the circumstances of the individual case, he takes steps reasonably calculated to terminate that unlawful use." Daniel was the owner of the farm, he was closely associated with Walter in Walter's bootlegging activities, and obviously knew what Walter was doing. In permitting his property thus to be used by Walter, Daniel could have been convicted for aiding and abetting Walter as to those offenses committed on the farm property (counts 3, 5, and 9, *supra*, pp. 14, 15). It was, of course unnecessary that he be specifically indicted as an aider and abettor (*Melling* v. *United*

natural reason and elementary principles of causation so demand.[34]

An example is *Boyd* v. *United States*, 142 U. S. 450, where the trial court in a case charging the defendants jointly with murder told the jury (pp. 455–456):

> If a number of men agree to do an act which, from its nature or the way it is to be done, is an act that will put human life in jeopardy, then the putting of human life in jeopardy, or the destruction of human life, is a necessary and a natural and a probable consequence of the act agreed to be done by the party, * * * it is but equal and exact justice that all who enter upon an enterprise of that kind should be responsible for the death of an innocent person that transpires because of the execution of the enterprise then entered upon, and because that enterprise is one that would naturally and reasonably produce that result. * * * when a number of persons agree to and enter upon the com-

States, 25 F. 2d 92 (C. C. A. 7); *O'Brien* v. *United States*, 25 F. 2d 90, 91 (C. C. A. 7)). But Daniel's case was submitted to the jury and his conviction affirmed not on this narrow basis but upon the broader principle of liability of a conspirator for substantive offenses committed by a coconspirator in carrying out the unlawful enterprise.

[34] See Sayre, *Criminal Responsibility for the Acts of Another*, 43 Harv. L. Rev. 689, 695 (1930): "From the beginning there has never been the slightest doubt that one who commands, counsels or procures another to commit a crime is himself guilty of the crime. In such a case there is no difficulty of causation or of liability without fault."

> mission of the crime of robbery, and a person is killed, who is an innocent person, in the execution of that purpose to rob, all the parties who have so entered into the agreement and enter upon the execution of the purpose to rob are equally responsible. The pistol or gun fired is the pistol or gun of each and every one of them.

As to these instructions, this Court said (p. 456):

> These principles, of the soundness of which we entertain no doubt, were enforced by the court in its charge by numerous illustrations drawn from adjudged cases and text-writers of high authority.[35]

In several cases involving prosecutions for substantive offenses committed by a defendant pursuant to a conspiracy, this Court has ruled that an element of the offense, such as motive or intent, might be proved by declarations or acts of the defendant's co-conspirators. See *Wiborg* v.

---

[35] The convictions of the defendants were reversed because of other erroneous instructions.

Other cases embodying the same principle are: *People* v. *Bringhurst*, 192 Cal. 748, 751 (1923); *People* v. *Rabbr*, 168 Cal. 316, 318 (1914); *People* v. *Lawrence*, 143 Cal. 148 (1904); *People* v. *Vasquez*, 49 Cal. 560 (1875); *Butler* v. *People*, 125 Ill. 641, 645 (1888); *Spies* v. *People*, 122 Ill. 1, 177–178, 225, 226 (1887); *Hanna* v. *People*, 86 Ill. 243, 245 (1877); *State* v. *Furney*, 41 Kan. 115, 121 (1889); *People* v. *Foley*, 59 Mich. 553, 556 (1886); *Odom* v. *State*, 172 Miss. 687 (1935); *Romero* v. *State*, 101 Neb. 650, 652 (1917); *People* v. *Michalow*, 229 N. Y. 325, 330–331 (1920); *State* v. *Heyward*, 2 Nott & McCord (S. C.) 312, 319–320 (1820); *Cooper* v. *State*, 69 Tex. Cr. Rep. 405, 407 (1913).

United States, 163 U. S. 632, 657–658; *American Fur Co.* v. *United States*, 2 Pet. 358, 362; see also *Brown* v. *United States*, 150 U. S. 93; *St. Clair* v. *United States*, 154 U. S. 134–149; *United States* v. *Gooding*, 12 Wheat. 460, 469. Cf. *Conn. Mut. Life Ins. Co.* v. *Hillmon*, 188 U. S. 208, 218–219; *Nudd* v. *Burrows*, 91 U. S. 426, 438.

Furthermore, it is immaterial that the conspirator was not present when the crime was committed. See *People* v. *Pierce*, 387 Ill. 608, 613 (1944); *People* v. *Payne*, 359 Ill. 246, 254 (1935); *Spies* v. *People*, 122 Ill. 1, 253 (1887); *People* v. *Michalow*, 229 N. Y. 325, 330–331 (1920); *State* v. *Heyward*, 2 Nott & McCord (S. C.) 312, 319–320 (1820); *Cooper* v. *State*, Tex. Cr. Rep. 405, 407 (1913); see also the mail fraud cases cited, *infra*, footnote 36, [redacted].

Illustrative of the doctrine that conspirators may be responsible for a substantive offense committed by one of them in furtherance of the conspiracy are numerous mail fraud cases. Here it is uniformly held that if there is a joint enterprise to violate the mail fraud statute (18 U. S. C. 338), all parties to the enterprise at the time the mailing occurred are responsible for the mailing;[36] and this is so, even though the prosecution

[36] See *Kann* v. *United States*, 140 F. 2d 380, 382 (C. C. A. 4), reversed on other grounds, 323 U. S. 88; *Blue* v. *United States*, 138 F. 2d 351, 359 (C. C. A. 6), certiorari denied, 322 U. S. 736–737; *Baker* v. *United States*, 115 F. 2d 533, 540 (C. C. A. 8), certiorari denied, 312 U. S. 692; *Hart* v. *United States*, 112 F. 2d 128, 131 (C. C. A. 5); *Mackett* v. *United States* 90 F. 2d 462 (C. C. A. 7); *Cochran* v. *United States*,

is not brought under the conspiracy statute.[37] The same principle has been utilized in prosecutions for sending non-mailable matter through the mails, with the result that where the evidence shows a joint enterprise contemplating the use of the mails, all parties thereto can be charged with the mailing. *Burton* v. *United States*, 142 Fed. 57, 62 (C. C. A. 8). And the principle has been employed in a case charging a conspiracy to violate the federal prohibition act and the substantive offenses of carrying on the business of a distiller contrary to law, fermenting mash for the distillation of spirits, and maintaining a common nuisance. *Johnson* v. *United States*, 62 F. 2d 32 (C. C. A. 9). In upholding appellants' convictions on the substantive counts as against their contention that they were not present at the place where and the time when the liquor was manufactured, the court said (p. 34):

> The evidence shows that the parties were associated together for the illegal purpose of manufacturing intoxicating liquor, and any act done by one or more of the parties

---

41 F. 2d 193, 199–200 (C. C. A. 8); *Tincher* v. *United States*, 11 F. 2d 18, 21 (C. C. A. 4); certiorari denied, 271 U. S. 664; *Ader* v. *United States*, 284 Fed. 13, 25 (C. C. A. 7), certiorari denied, 260 U. S. 746; *Preeman* v. *United States*, 244 Fed. 1, 18 (C. C. A. 7), certiorari denied, 245 U. S. 654; *Chambers* v. *United States*, 237 Fed. 513, 524–525 (C. C. A. 8).

[37] See *Cochran* v. *United States*, 41 F. 2d 193, 199–200 (C. C. A. 8); *Ader* v. *United States*, 284 Fed. 13, 25 (C. C. A. 7), certiorari denied, 260 U. S. 746; *Preeman* v. *United States*, 244 Fed. 1, 18 (C. C. A. 7), certiorari denied, 245 U. S. 654.

to accomplish that purpose was the act of all.

We, of course, recognize that the doctrine cannot be extended to fasten liability for the commission of the substantive offense upon one who joins the conspiracy after the commission of the offense. An individual's ratification of another's criminal act cannot form the basis of criminal liability. He must be criminally liable, if at all, at the time when the crime takes place. See *United States v. Fox*, 95 U. S. 670, 671: "The criminal intent essential to the commission of a public offence must exist when the act complained of is done: it cannot be imputed to a party from a subsequent independent transaction." See also, Sayre, *Criminal Responsibility for the Acts of Another*, 43 Harv. L. Rev. 689, 708 (1930); Bishop, *Criminal Law* (9th ed). vol. 1, p. 466. On the other hand, in the case where a substantive offense is committed pursuant to the conspiracy by one of the conspirators, those who were then associated with him may be held responsible because their bringing about the crime resulted in a concurrence of act and criminal intent on their part. No different principle is involved even in conspiracy prosecutions by the application of the doctrine that one who joins a conspiracy after its inception is bound by the acts and declarations of his co-conspirators notwithstanding they occur prior to his association with the conspiracy. The guilt as a

conspirator of the later participant does not flow from the fact that the earlier participants may have committed criminal acts, since the gist of the offense is the agreement to commit a crime and not the crime itself; the later participant becomes criminally responsible because, with the requisite knowledge and intent, he associates himself with an existing combination to commit crime (*United States* v. *Falcone*, 311 U. S. 205; see also, *Direct Sales Co.* v. *United States*, 319 U. S. 703); the prior acts and declarations are utilized to establish the illegal character of the combination. *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229, 249.

The only decision we have found which fails to hold a conspirator for substantive offenses committed pursuant to the conspiracy is *United States* v. *Sall*, 116 F. 2d 745 (C. C. A. 3). We believe that analysis of the decision will demonstrate its unsoundness. There Sall had been convicted upon eight counts of an indictment which charged him and others in the first count with conspiring to violate the internal revenue laws, viz., carrying on the business of distillers with intent to defraud the Government of the tax imposed thereon; possessing an unregistered still, making mash fit for distillation in an unauthorized building; removing and aiding in removing distilled spirits to a building which was not a bonded warehouse; and concealing and aiding in the concealment of untaxed distilled spirits; the other counts charged substan-

tive violations of the internal revenue laws, three, including count 7, charging that the defendants concealed and were concerned in the concealment of alcohol with intent to defraud the Government of the tax imposed thereon. The conviction was affirmed except as to count 7. The conviction on this count was reversed because the court concluded that the evidence was insufficient to show that Sall participated in the offense, although it is clear from its statement that it deemed the concealments as having been committed pursuant to the conspiracy (p. 747). The Government contended that on the basis of Sall's participation in the conspiracy, he was liable under the aider and abettor statute (footnote 33, *supra*, p. 40) for "any and all crimes thereafter committed in the course of the ramifications of the enterprise, quite apart from personal participation in or even knowledge of the precise details" (116 F. 2d at 747).

Circuit Judge Maris, writing for the court, said (pp. 747–748):

> It was not sufficient merely to prove that [Sall] was a member of the conspiracy to manufacture illicit alcohol and that in the course of that conspiracy those particular crimes were committed by other conspirators. * * *
>
> Here the government seeks to charge one of the conspirators with a substantive offense—concealment of alcohol. Although that offense may in fact have been committed in the course of the conspiracy it is

still necessary to prove that the defendant, even though he had joined the conspiracy, had also joined, at least to the extent which we have indicated,[38] in the concealment of alcohol which constituted the substantive offense with which he is charged. It is the act of concealment with criminal intent, and not the previous agreement, which is the gist of that offense. To hold otherwise would be to ignore the difference in character between the crime of conspiracy and the substantive crimes which may result from it and to enable the government through the use of the conspiracy dragnet to convict a conspirator of every substantive offense committed by any other member of the group even though he had no part in it or even knowledge of it. To permit this would open the way for the conviction of a conspirator more than once for the same conspiracy, the substantive counts being, if the government's theory is accepted, in fact merely additional conspiracy counts each alleging one overt act. Where as here but one conspiracy has been shown a defendant may not thus be convicted twice of having joined it for that would be to place him twice in jeopardy for the same offense.[39]

---

[38] I. e., "he did with intent to derfaud the revenues aid, abet, counsel, command, induce or procure the removal, deposit or concealment of the particular untaxpaid alcohol referred to in the three counts" (116 F. 2d at 747).

[39] The evidence as to the other challenged substantive counts was found adequate.

We do not, of course, espouse the Government's view in the *Sall* case that a conspirator is responsible for any and all crimes committed in the course of the ramifications of a conspiracy, but the basis of Judge Maris' decision is a different one, i. e., that a conspirator is not liable for a substantive crime committed by a fellow conspirator unless he directly participates in or has knowledge of it even though, as in the case before him, the substantive crime is committed pursuant to the conspiracy. Judge Maris wholly overlooks the rationale which binds one conspirator for a substantive offense of his co-conspirators committed in furtherance of the conspiracy. The non-actor in the commission of the substantive offense is not being punished twice for conspiracy, nor is he being punished for a crime as to which he had no criminal intent, as Judge Maris suggests. The conspiracy to commit the crime is one offense, and, if an overt act is committed to further it, not necessarily the crime contemplated, the parties to the conspiracy are punishable for the agreement, whether or not a substantive crime has been committed. On the other hand, if one of the parties actually commits a crime pursuant to the agreement, all parties to the conspiracy are responsible therefor, because each of them instigated the commission of the crime; the crime might never have been committed but for the conspiracy. The crime is the result of action in which each party acquiesced

or which he should have foreseen might be taken. The conspirator is not held merely because of his agreement, but because he did something which led to the commission of the crime. We see nothing novel or unjust in requiring the conspirator to pay for the crime which he caused to be committed. Judge Maris does not deny that a conspirator may be held for an overt act which he does not commit but which cements his conspiratorial liability. The conspirator can always avoid liability by effectively withdrawing from the conspiracy before the crime is committed. (Cf. *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 253). Why should any different rule be applied as to substantive offense which is committed in furtherance of the partnership in crime?

We thus come to the final issue in the case, namely, whether the trial judge's instruction told the jury that Daniel could be found guilty of the substantive offenses in question if they found that the offenses were committed in furtherance of a conspiracy to commit them to which he was a party at the time or if they found that they were a natural consequence of the conspiracy. As we have stated, *supra*, p. 16, the judge told the jury "if you are satisfied from the evidence beyond a reasonable doubt that at the time these particular substantive offenses were committed * * * that the two defendants were in an unlawful conspiracy, as I have heretofore defined unlawful

conspiracy to you, then you would have a right * * * to convict each of these defendants on all these substantive counts, provided the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy or object of the unlawful conspiracy, which you have found from the evidence existed." (See R. 191–192.)

The only objects of the conspiracy which were not withdrawn from the jury's consideration were that petitioners conspired to possess whiskey in untax-paid containers, that they conspired to remove, deposit, or conceal whiskey with intent to defraud the Government of the tax imposed thereon, and perhaps, on the basis of Walter's sales, that they conspired that Walter should carry on the business of a retail liquor dealer without having paid the required tax (see *supra*, p. 17). The only substantive offenses with which we are concerned are those relating to the removal, deposit, or concealment of whiskey by Walter with intent to defraud the Government of the tax imposed thereon. It can hardly be said that the commission of this type of offense was not in furtherance of or a natural consequence of the conspiracy which the jury had before it. Even if we assume, at the worst, that the jury found only a conspiracy to carry on the business of a retail liquor dealer without paying the required tax, it is entirely reasonable that concealing whiskey with intent to defraud the

Government of the tax imposed thereon would be a natural outgrowth of that conspiracy. On the other hand, if, as is more likely on the basis of the evidence, the jury found that the conspiracy included all three objects, there can be no doubt that the substantive offenses were in furtherance of or natural consequences of the conspiracy.

We conclude, therefore, that Daniel's conviction on the substantive counts here involved was proper, and that petitioners' sentences on the substantive counts of which they stand convicted are not excessive.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
W. MARVIN SMITH,
Special Assistant to the Attorney General.
ROBERT S. ERDAHL,
LEON ULMAN,
Attorneys.

APRIL 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946

dissent p. 2.

SUPREME COURT OF THE UNITED STATES.

No. 719. October Term, 1945.

W. Daniel Pinkerton and Walter G. Pinkerton, Petitioners, vs. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[June 10, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

Walter and Daniel Pinkerton are brothers who live a short distance from each other on Daniel's farm. They were indicted for violations of the Internal Revenue Code. The indictment contained ten substantive counts and one conspiracy count. The jury found Walter guilty on nine of the substantive counts and on the conspiracy count. It found Daniel guilty on six of the substantive counts and on the conspiracy count. Walter was fined $500 and sentenced generally on the substantive counts to imprisonment for thirty months. On the conspiracy count he was given a two year sentence to run concurrently with the other sentence. Daniel was fined $1,000 and sentenced generally on the substantive counts to imprisonment for thirty months. On the conspiracy count he was fined $500 and given a two year sentence to run concurrently with the other sentence. The judgments of conviction were affirmed by the Circuit Court of Appeals.[1] 151

[1] The court held that two of the counts under which Walter was convicted and one of the counts under which Daniel was convicted were barred by the statute of limitations and that as to them the demurrer should have been sustained. But each of the remaining substantive counts on which the jury had returned a verdict of guilty carried a maximum penalty of three years' imprisonment and a fine of $5,000. Int. Rev. Code, § 3321, 26 U. S. C. § 3321. Hence the general sentence of fine and imprisonment imposed on each under the substantive counts was valid. It is settled law, as stated in Claassen v. United States, 142 U. S. 140, 146-147, "that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only."

The same rule obtains in the case of concurrent sentences. Hirabayashi v. United States, 320 U. S. 81, 85 and cases cited.

F. 2d 499. The case is here on a petition for a writ of certiorari which we granted, because one of the questions presented involved a conflict between the decision below and *United States* v. *Sall*, 116 F. 2d 745, decided by the Circuit Court of Appeals for the Third Circuit.

A single conspiracy was charged and proved. Some of the overt acts charged in the conspiracy count were the same acts charged in the substantive counts. Each of the substantive offenses found was committed pursuant to the conspiracy. Petitioners therefore contend that the substantive counts became merged in the conspiracy count, and that only a single sentence not exceeding the maximum two-year penalty provided by the conspiracy statute (Criminal Code § 37, 18 U. S. C. § 88) could be imposed. Or to state the matter differently, they contend that each of the substantive counts became a separate conspiracy count but since only a single conspiracy was charged and proved, only a single sentence for conspiracy could be imposed. They rely on *Braverman* v. *United States*, 317 U. S. 49.

In the *Braverman* case the indictment charged no substantive offense. Each of the several counts charged a conspiracy to violate a different statute. But only one conspiracy was proved. We held that a single conspiracy, charged under the general conspiracy statute, however diverse its objects may be, violates but a single statute and no penalty greater than the maximum provided for one conspiracy may be imposed. That case is not apposite here. For the offenses charged and proved were not only a conspiracy but substantive offenses as well.

Nor can we accept the proposition that the substantive offenses were merged in the conspiracy. There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. See *United States* v. *Katz*, 271 U. S. 354, 355-356; *Gebardi* v. *United States*, 287 U. S. 112, 121-122. Another is where the definition of the substantive offense excludes from punishment for conspiracy one who voluntarily participates in another's crime.

Gebardi v. *United States*, *supra*. But those exceptions are of a limited character. The common law rule that the substantive offense, if a felony, was merged in the conspiracy,[2] has little vitality in this country.[3] It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established. *Clune* v. *United States*, 159 U. S. 590, 594-595. A conviction for the conspiracy may be had though the substantive offense was completed. See *Heike* v. *United States*, 227 U. S. 131, 144. And the plea of double jeopardy is no defense to a conviction for both offenses. *Carter* v. *McClaughry*, 183 U. S. 365, 395. It is only an identity of offenses which is fatal. *See Gavieres* v. *United States*, 220 U. S. 338, 342. Cf. *Frieman* v. *United States*, 146 F. 2d 978. A conspiracy is a partnership in crime. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 253. It has ingredients, as well as implications, distinct from the completion of the unlawful project. As stated in *United States* v. *Rabinowich*, 238 U. S. 78, 88:

> "For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered."

And see *Sneed* v. *United States*, 298 Fed. 911, 912-913; *Banghart* v. *United States*, 148 F. 2d 521.

Moreover, it is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive offenses. As stated in *Sneed* v. *United States*, *supra*, p. 913, "If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it."

[2] See May's Law of Crimes (4th ed. 1938) § 126; 17 Corn. L. Q. (1931) 136; People v. Tavorima, 257 N. Y. 84, 89-90.

[3] The cases are collected in 37 A. L. R. 778; 75 A. L. R. 1411.

The agreement to do an unlawful act is even then distinct from the doing of the act.[4]

It is contended that there was insufficient evidence to implicate Daniel in the conspiracy. But we think there was enough evidence for submission of the issue to the jury.

There is, however, no evidence to show that Daniel participated directly in the commission of the substantive offenses on which his conviction has been sustained,[5] although there was evidence to show that these substantive offenses were in fact committed by Walter in furtherance of the unlawful agreement or conspiracy existing between the brothers. The question was submitted to the jury on the theory that each petitioner could be found guilty of the substantive offenses, if it was found at the time those offenses were committed, petitioners were parties to an unlawful conspiracy and the substantive offenses charged were in fact committed in furtherance of it.[6]

---

[4] The addition of a conspiracy count may at times be abusive and unjust. The Conference of Senior Circuit Judges, reported in 1925:

"We note the prevalent use of conspiracy indictments for converting a joint misdemeanor into a felony; and we express our conviction that both for this purpose and for the purpose—or at least with the effect—of bringing in much improper evidence, the conspiracy statute is being much abused.

"Although in a particular case there may be no preconcert of plan, excepting that necessarily inherent in mere joint action, it is difficult to exclude that situation from the established definitions of conspiracy; yet the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for cooperative law breaking. We observe so many conspiracy prosecutions which do not have this substantial base that we fear the creation of a general impression, very harmful to law enforcement, that this method of prosecution is used arbitrarily and harshly. Further the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant." Annual Report of the Attorney General for 1925, pp. 5-6.

But we do not find that practice reflected in this present case.

[5] This question does not arise as to Walter. He was the direct actor in some of the substantive offenses on which his conviction rests. So the general sentence and fine are supportable under any one of those. See note 1, *supra*.

[6] The trial court charged: " . . . after you gentlemen have considered all the evidence in this case, if you are satisfied from the evidence beyond a reasonable doubt that at the time these particular substantive offenses were committed, that is, the offenses charged in the first ten counts of this indictment if you are satisfied from the evidence beyond a reasonable doubt that the two defendants were in an unlawful conspiracy, as I have heretofore defined unlawful conspiracy to you, then you would have a right, if you found that to be true to your satisfaction beyond a reasonable doubt, to convict each of these defendants on all these substantive counts, provided the

Daniel relies on *United States* v. *Sall*, *supra*. That case held that participation in the conspiracy was not itself enough to sustain a conviction for the substantive offense even though it was committed in furtherance of the conspiracy. The court held that, in addition to evidence that the offense was in fact committed in furtherance of the conspiracy, evidence of direct participation in the commission of the subsantive offense or other evidence from which participation might fairly be inferred was necessary.

We take a different view. We have here a continuous conspiracy. There is here no evidence of the affirmative action on the part of Daniel which is necessary to establish his withdrawal from it. *Hyde* v. *United States*, 225 U. S. 347, 369. As stated in that case, "Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law. As the offense has not been terminated or accomplished, he is still offending. And we think, consciously offending, offending as certainly, as we have said, as at the first moment of his confederation, and consciously through every moment of its existence." *id.*, p. 369. And so long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that "an overt act of one partner may be the act of all without any new agreement specifically directed to that act." *United States* v. *Kissel*, 218 U. S. 601, 608. Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective. *Wiborg* v. *United States*, 163 U. S. 632, 657-658. A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy. *Cochran* v. *United States*, 41 F. 2d 193, 199-200. Yet all members are responsible, though only one did the mailing. *Cochran* v. *United States*, *supra*; *Macketi* v. *United States*, 90 F. 2d 462, 464; *Baker* v. *United States*, 115 F. 2d 533, 540; *Blue* v. *United States*, 138 F. 2d 351, 359. The governing principle is the same when the substantive offense is committed by one of the conspirators in furtherance of the unlawful project. *Johnson* v.

---

acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy or object of the unlawful conspiracy, which you have found from the evidence existed". Daniel was not indicted as an aider or abettor (see Criminal Code, § 332, 18 U. S. C. 550), nor was his case submitted to the jury on that theory.

United States, 62 F. 2d 32, 34. The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all. An overt act is an essential ingredient of the crime of conspiracy under § 37 of the Criminal Code, 18 U. S. C. § 88. If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense.

A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement. But as we read this record, that is not this case.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 719.—October Term, 1945.

W. Daniel Pinkerton and Walter G. Pinkerton, Petitioners, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[June 10, 1946.]

Mr. Justice Rutledge, dissenting in part.

The judgment concerning Daniel Pinkerton should be reversed. In my opinion it is without precedent here and is a dangerous precedent to establish.

Daniel and Walter, who were brothers living near each other, were charged in several counts with substantive offenses, and then a conspiracy count was added naming those offenses as overt acts. The proof showed that Walter alone committed the substantive crimes. There was none to establish that Daniel participated in them, aided and abetted Walter in committing them, or knew that he had done so. Daniel in fact was in the penitentiary, under sentence for other crimes, when some of Walter's crimes were done.

There was evidence, however, to show that over several years Daniel and Walter had confederated to commit similar crimes concerned with unlawful possession, transportation, and dealing in whiskey, in fraud of the federal revenues. On this evidence both were convicted of conspiracy. Walter also was convicted on the substantive counts on the proof of his committing the crimes charged. Then, on that evidence without more than the proof of Daniel's criminal agreement with Walter and the latter's overt acts, which were also the substantive offenses charged, the court told the jury they could find Daniel guilty of those substantive offenses. They did so.

I think this ruling violates both the letter and the spirit of what Congress did when it separately defined the three classes of crime, namely, (1) completed substantive offenses,[1] (2) aiding,

[1] These of course comprehend the vast variety of offenses prescribed by federal law, conspiracies for accomplishing which may be charged under the catchall conspiracy statute, note 3.

abetting or counseling another to commit them,[2] and (3) conspiracy to commit them.[3] Not only does this ignore the distinctions Congress has prescribed shall be observed. It either convicts one man for another's crime or punishes the man convicted twice for the same offense.

The three types of offense are not identical. *Bolienbach v. United States*, 326 U. S. — (slip ~~opinion, p. 3~~); *United States v. Sall*, 116 F. 2d 745. Nor are ~~these~~ their differences merely verbal. *Ibid.* The gist of conspiracy is the agreement; that of aiding, abetting or counseling is in consciously advising or assisting another to commit particular offenses, and thus becoming a party to them; that of substantive crime, going a step beyond mere aiding, abetting, counseling to completion of the offense.

These general differences are well understood. But when conspiracy has ripened into completed crime, or has advanced to the stage of aiding and abetting, it becomes easy to disregard their differences and loosely to treat one as identical with the other, that is, for every purpose except the most vital one of imposing sentence. And thus the substance, if not the technical effect, of double jeopardy or multiple punishment may be accomplished. Thus also may one be convicted of an offense not charged or proved against him, on evidence showing he committed another.

The old doctrine of merger of conspiracy in the substantive crime has not obtained here. But the dangers for abuse, which in part it sought to avoid, in applying the law of conspiracy have not altogether disappeared. Cf. *Kotteakos v. United States*, Nos. 457-458, decided today. There is some evidence that they may be increasing. The looseness with which the charge may be proved, the almost unlimited scope of vicarious responsibility for others' acts which follows once agreement is shown, the psychological advantages of such trials for securing convictions by attributing to one proof against another, these and other inducements require that the broad limits of discretion allowed to prosecuting officers in relation to such charges and trials be not expanded into new, wider and more dubious areas of choice. If the matter is not

[2] "Whoever directly commits, any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." 18 U. S. C. § 332.

[3] "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than 2 years, or both." 18 U. S. C. § 88.

generally of constitutional proportions, it is one for the exercise of this Court's supervisory power over the modes of conducting federal criminal prosecutions within the rule of *McNabb* v. *United States*, 318 U. S. 332.

I think that power should be exercised in this case with respect to Daniel's conviction. If it does not violate the letter of constitutional right, it fractures the spirit. *United States* v. *Sall*, *supra*. I think the ruling in that case was right, and for the reasons stated.[4] It should be followed here. Daniel has been held guilty of the substantive crimes committed only by Walter, on proof that he did no more than conspire with him to commit offenses of the same general character. There was no evidence that he counseled, advised or had knowledge of those particular acts or offenses. There was, therefore, none that he aided, abetted or took part in them. There was only evidence sufficient to show that he had agreed with Walter at some past time to engage in such transactions generally. As to Daniel this was only evidence of conspiracy, not of substantive crime.

The court's theory seems to be that Daniel and Walter became general partners in crime by virtue of their agreement and because of that agreement without more on his part Daniel became criminally responsible as a principal for everything Walter did thereafter in the nature of a criminal offense of the general sort the agreement contemplated, so long as there was not clear evidence that Daniel had withdrawn from or revoked the agreement. Whether or not his commitment to the penitentiary had that effect, the result is a vicarious criminal responsibility as broad as, or broader than, the vicarious civil liability of a partner for acts done by a co-partner in the course of the firm's business.

Such analogies from private commercial law and the law of torts are dangerous, in my judgment, for transfer to the criminal field. See Sen. Rep. No. 163, 72d. Cong., 1st Sess., 20.

[4] In the substantially identical situation presented in the *Sall* case as to the indictment and the proof, the Government argued that the conviction on the substantive counts should stand because the proof that the accused had entered the conspiracy amounted to proof that he had "aided and abetted" the commission of the substantive crimes within the meaning of 18 U. S. C. § 550. The court rejected the idea, apparently now accepted here, that "aiding and abetting" and "conspiring" are, and are intended by Congress to be the same thing, differing only in the form of the descriptive words. But if that is the only difference, then conviction for both "offenses" on account of the same act is clearly double punishment.

Guilt there with us remains personal, not vicarious, for the more serious offenses. It should be kept so. The effect of Daniel's conviction in this case, to repeat, is either to attribute to him Walter's guilt or to punish him twice for the same offense, namely, agreeing with Walter to engage in crime. Without the agreement Daniel was guilty of no crime on this record. With it and no more, so far as his own conduct is concerned, he was guilty of two.

In another aspect of the case, this effect is thrown into even clearer light. The indictment here was filed after a prior one for conspiracy alone had been dismissed. This in turn came after petitioners had been tried, convicted and had been successful in securing reversal on appeal for errors in the charge. *Pinkerton* v. *United States*, 145 F. 2d 252. Following this reversal they were reindicted and tried in the present case. The Government now says, as to the plea of double jeopardy on this account (which the trial court overruled on demurrer), that the two indictments were for different conspiracies since the first one charged a different period of time as covered by the conspiracy; charged 16 as compared with 19 overt acts in the second; and an additional object was added in the latter, that is, intent to violate another section of the revenue act. In other words, there were two different conspiracies by virtue of these minute differences in the detail of the allegations. Hence, there was no double jeopardy by the second indictment.

But later, in support of the conviction here, relative to the bearing of the various statutes of limitations upon proof of the overt acts, charged also as substantive offenses, the Government points out that the earlier indictment was framed on the assumption that a three-year statute of limitations applied to the conspiracy as first charged and the convictions were reversed for failure of the trial court to instruct the jury on that basis. Then the District Attorney discovered the decision in *Braverman* v. *United States*, 317 U. S. 49, 54-55, and decided to revamp the indictment to include details making the six-year period applicable. He did so, and added the substantive counts because, so it is said, in the view that a six-year period applied he felt there were enough substantive offenses within that time which he could successfully prove to justify including them.

It would seem, from this history, that to sustain this conviction as against the plea of former jeopardy by virtue of the earlier

indictment and what followed, the Government stands, and must stand, upon the idea that two separate and distinct conspiracies were charged, one by the first and one by the later indictment. See *United States* v. *Oppenheimer*, 242 U. S. 85, 87-88. But to sustain Daniel's conviction for the substantive offenses, via the conspiracy route, there was only a single continuing conspiracy extending over the longer period, in the course of which Walter committed crimes, which were also overt acts, some of them running back of the period charged in the former indictment, others being the same but later acts which it had charged as overt acts against both.

For these now Daniel is held responsible, not merely as a conspirator, as the prior indictment charged, but as both a conspirator and a substantive offender.

What this lacks by way of being put twice in jeopardy for the same offense, I am unable to understand. For not only has Daniel been convicted for conspiracy, for the same overt acts, and illegal ends, as the first indictment charged. He has had those acts converted into substantive offenses. I do not think the prosecutor's technical, and it would seem insubstantial, variations in the details of the indictment should be permitted to achieve so much.[5]

This, of course, should not relieve Walter of the conviction for the substantive offenses. But his sentence for conspiracy should be annulled. So also should Daniel's sentence on all counts.

Mr. Justice FRANKFURTER, reserving judgment on the question of double jeopardy, agrees in substance with the views expressed in this dissent.

---

[5] The situation is essentially the same as when crimes are defined with such minute distinction as to make them different only in the most technical sense. See District of Columbia v. Buckley, 126 F. 2d 17, concurring opinion at 21; cf. Ex parte Nielsen, 131 U. S. 176; In re Snow, 120 U. S. 274.